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Joint Committee on Finance

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Private Bar Attorney Compensation (Public Defender)

[LFB 2023-25 Budget Summary: Page 478, #2]

CURRENT LAW

The cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD). The SPD employs trial and appellate attorneys who represent clients who qualify for SPD representation. Generally, the State Public Defender provides legal representation for indigent persons: (a) facing a possible sentence that includes incarceration; (b) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapter 48 and 938 of the Wisconsin statutes); (c) subject to petitions for protective placement (Chapter 55 of the Wisconsin statutes); (d) facing involuntary commitment; (e) involved in certain post-conviction or post-judgment appeals; and (f) undergoing proceedings for modification of a bifurcated sentence, if representation has been requested by the indigent person or the case has been referred by a court, and the Public Defender determines that the case should be pursued. Further, unless the individual knowingly and voluntarily waives counsel or appoints his or her own counsel, the SPD must provide counsel to the following individuals without a determination of indigency: (a) those involved in certain proceedings under the Children's and Juvenile Justice Codes; (b) those subject to petitions for protective placement; and (c) those facing involuntary commitment.

While the SPD employs trial and appellate attorneys who represent clients who qualify for SPD representation, staff attorneys do not represent all clients who qualify for SPD representation. Indigent legal defense cases are assigned by the SPD to private bar attorneys due to either an overflow of cases in excess of what can be assigned to available SPD staff attorneys, or for cases in which staff attorneys may have a conflict of interest. Private bar attorneys assigned to SPD cases may be paid in one of two following ways: (a) at a statutorily defined rate of \$70 per hour for time spent in and out of court related to a case, and \$25 per hour for travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip

requires travelling a distance of more than 30 miles, one way, from the attorney's principal location; or (b) a flat, per case contracted fee that may not result in the private attorney receiving more than the attorney would have if the attorney was reimbursed pursuant to the statutory rate.

DISCUSSION POINTS

1. The Office is primarily funded through general purpose revenue, which is utilized to support trial and appellate staff attorneys as well as reimbursements to private bar attorneys who are assigned indigent legal defense cases. In order to provide representation for indigent clients, the SPD has both a trial division and an appellate division. The trial division is comprised of 37 local trial offices located throughout Wisconsin, while the appellate division is comprised of two appellate offices, located in Madison and Milwaukee. Base resources for the SPD's trial division are \$60,906,300 GPR and 546.85 GPR positions, and base resources for the appellate division are \$5,241,600 GPR and 44.35 GPR positions.

2. Wisconsin statute establishes that each trial division assistant state public defender must meet one of the following annual caseload requirements: (a) 184.5 felony cases; (b) 15 first-degree homicides; (c) 15 sexual predator cases; (d) 492 misdemeanor cases; (e) 246 other cases; or (f) some combination of these categories. [Note that "other" cases generally litigated by the SPD include civil commitment proceedings, felony delinquency proceedings, protective placement proceedings under Chapter 55 of the statutes, juvenile cases, felony diversion cases, revocation hearings, termination of parental rights cases, juvenile waiver proceedings, as well as other miscellaneous cases.] Wisconsin statutes allow the SPD, however, to exempt up to 10 full-time supervisory ASPDs from the caseload requirement due to those attorneys' additional responsibilities. The statutorily-defined caseload requirement is considered a minimum workload for ASPDs, and does not address workload demands such as administrative tasks, training and continuing education requirements, and other justice system activities such as participating in criminal justice coordinating councils and treatment courts.

Private Bar Background

3. The SPD employs trial and appellate staff attorneys to represent clients who qualify for SPD representation. However, SPD staff attorneys do not represent all clients who qualify for SPD representation. Due to an overflow of cases in excess of what can be assigned to SPD staff, as well as conflict of interests that may exist between SPD staff and potential clients, the SPD must assign certain cases to private bar attorneys.

4. The workload or number of cases the SPD must assign either to a staff or private bar attorney is dependent on a number of factors, such as the number of people who are statutorily defined as "indigent." In addition, changes in statute regarding the number of misdemeanors and felonies, as well as statutorily changing a misdemeanor to a felony will impact the number of cases going to the SPD. Finally, discretion inherent within the criminal justice system impacts in the number of cases going to the SPD, wherein in one region a case may be handled as an ordinance violation where there is no right to an attorney, in another it may be handled as a misdemeanor, which means that if the defendant is indigent they will be assigned either a staff attorney or a private bar attorney by the state.

5. In 1978, when the Legislature established the SPD's role in circuit courts, the hourly rate of compensation for appointed lawyers was \$35 (\$25 for travel time). In 1992, private bar compensation was increased to \$50 for in-court time and \$40 for out-of-court time; travel time remained unchanged at \$25. However, in 1995, the rate was reduced for in-court time to a uniform \$40 hourly rate. In 2021, the rate was increased to \$70 per hour. The \$25 hourly rate for travel remained unchanged. Currently, private bar attorneys are compensated pursuant to either: (a) a statutorily defined rate totaling \$70 per hour for time spent related to a case in and out of court, and \$25 per hour for travel of more than 30 miles; or (b) a flat, per case contracted fee that may not result in the attorney receiving more than he or she would under the statutory rate. Except for a number of misdemeanor cases, private bar attorneys are generally compensated pursuant to the statutory rate.

6. Private bar attorneys compensated at the statutory rate are assigned cases on a rotational basis. Private attorneys who desire indigent legal defense cases must submit their name, legal education, and legal experience that qualifies them to provide representation in the types of cases they have expressed an interest in litigating. For each county, the SPD must annually prepare, certify, and update a list of these private attorneys seeking to litigate indigent legal defense cases.

7. Private bar attorneys assigned SPD cases do not have to meet an annual caseload requirement. Base GPR funding for the biennial private bar and investigator reimbursements is \$41,648,400 GPR annually. In addition to GPR, the SPD utilizes a portion of the program revenue generated from clients who are able to provide modest payments for legal representation to support private bar reimbursements.

8. In 2021-22, the SPD expended \$25,912,100 on private bar payments. It should be noted that in 2021-22, about 15% of payments to the private bar were assigned before the January 1, 2020, rate change and were paid at the \$40 per hour rate. As of April 30, 2023, the SPD has expended \$29,262,800 on private bar payments. If spending for the last two months of the biennium continue at the average over 10 months, the SPD will spend an estimated \$35.2 million on private bar payments resulting in an estimated total expenditure of \$61.1 million over the biennium.

9. In 2021-22, 117,621 new trial cases were assigned to SPD staff attorneys and private bar attorneys. Of the newly-assigned cases, 70,808 trial (60.2%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 46,813 trial cases (39.8%). Of these cases assigned to private bar attorneys, 18,346 cases were related to case overflow, 8,974 cases were instances where a client with a private bar attorney has multiple cases, and 19,493 were conflict of interest cases.

Supreme Court Rule and County Appointed Attorneys in Criminal Cases

10. If an individual does not meet the statutory indigency standard of the SPD, but is nonetheless determined by a circuit court to be unable to hire counsel and have a constitutional right to counsel, the court may appoint an attorney at either county, rather than state, expense or require the county to provide a loan to the defendant for counsel (counties subsequently recoup these costs). These type of appointments are called "Dean" appointments, named for a 1991 Wisconsin Court of Appeals case related to indigent defendants who do not qualify for SPD representation. The decision to appoint counsel is at the discretion of the circuit court judge. Each judge has their own criteria for court appointed counsel. Some counties with multiple judges establish criteria for court appointed

counsel and county loans, typically requiring the defendant to be below 200% of the federal poverty level (\$29,160 family size one; \$39,440 for family size two).

11. Minimum reimbursement for court appointed counsel is set through Wisconsin Supreme Court Rules (SCR). Initially, the rate in SCR 81.02 was \$50 per hour, with lesser rates for office and travel time. In 1989, it was raised to \$60 per hour. In 1993, the court increased the rate from \$60 to \$70 per hour and adopted SCR 81.02(1m), permitting county flat rate contracts. Dane County has used county flat rate contracts since 2008. Other counties may have adopted similar cost-saving measures in the years since 2011 when the indigency standard was last updated. On June 27, 2018, the Supreme Court ordered an increase to \$100 per hour, starting January 1, 2020.

Raising the Private Bar Rate to \$100 Per Hour

12. Had the \$35 dollar per hour rate (\$25 for travel) set in 1978 been indexed with the consumer price index, the rate would be the equivalent of paying approximately \$168 per hour (\$120 for travel) today. In 1992, private bar compensation was increased to \$50 for in-court time and \$40 for out-of-court time, which would be the equivalent of about \$109 per hour for in-court time today. However, in 1995, the rate was reduced for in-court time to a uniform \$40 hourly rate, which would be the equivalent of \$80 today.

13. In comparison, attorneys retained by federal, state and local governments are paid substantially more than \$70 per hour. The Federal Defender pays defense attorneys \$158 per hour for non-capital federal cases. In some counties in Wisconsin, judges are making court appointments at \$20 to \$25 per hour higher than the \$100 reimbursement rate. Milwaukee has paid up to \$125 an hour for serious cases, Oconto is paying \$125 an hour for all case types, and Marinette is paying \$125 an hour for Dean, Guardian ad Litem, and adult child in need of protective services appointments and \$150 an hour for termination of parental rights. Therefore, some attorneys will take certain cases, but not the SPD cases.

14. The number of attorneys who have actively taken Public Defender appointments has declined during the pandemic, from 940 attorneys certified in January 2019 to 772 attorneys in August 2022, a 17.9% decrease. In 2021-22, of these 770 certified attorneys: (a) 13% took no case appointments; (b) 39% took fewer than 26 appointments; (c) 16% took 26-50 appointments; and (d) 33% took more than 50 appointments.

15. The SPD indicates that it takes an average of 123 contacts statewide to appoint a private bar attorney. In some counties, it can take more than 200 contacts, with outliers taking more than 1,000 contacts to appoint a single case. The SPD indicates that private bar attorneys cite the \$70 per hour rate as one of the main factors in their decision to decline SPD case appointments.

16. In general, it is less expensive to assign a case to a staff attorney rather than to assign a case to the private bar. In order to mitigate costs associated with a private bar rate increase, the SPD is statutorily authorized to submit a passive review request for additional GPR position authority using existing budget authority. This mechanism for balancing private bar and staff attorney caseloads and costs was created in the 2017-19 biennial budget. No ability to increase funding is authorized under this provision.

17. Assembly Bill 43/Senate Bill 70 would modify current law to increase the rate at which private bar attorneys are compensated from \$70 per hour to \$100 per hour and from \$25 to \$50 per hour for travel. The intent of the increase is to assist the criminal justice system to work efficiently by attracting more attorneys to take private bar cases. In addition, AB 43/SB70, would grant the SPD authority to modify rules to reflect the changes in the rate. The increase in hourly compensation would apply to cases assigned on or after July 1, 2023.

18. When calculating the amounts needed to support at \$100 private bar rate, AB 43/SB 70 used 2021-22 expenditures (\$26 million) as the beginning point for projecting amounts needed for the 2023-25 biennium. This is understandable given that budget preparations begin in the fall of 2022. However, using estimated 2022-23 expenditures of \$35 million as the beginning point for 2023-25, the amounts in the bill are overstated by approximately \$4.0 million over the biennium. For this reason, the amounts recommended in AB 43/SB 70 are not listed in the alternatives section of this paper.

Rate Increase

19. There are several assumptions used in determining the number of cases assigned in the 2023-25 biennium. Assumptions include: (a) no new misdemeanors or felonies are added, and no new misdemeanors will be changed into felonies; (b) there will be no changes in eligibility standards for an SPD attorney; and (c) no unforeseen economic circumstances make more people eligible for Public Defender services. Finally, it is assumed that the number of available staff attorneys will remain the same, particularly, that the ASPD will have a turnover rate (the rate at which agency positions became vacant) of 18% (shifting 60 caseloads to the private bar) in each year of the next biennium. This turnover rate was the actual rate in 2021-22. To the extent that ASPD salaries are increased, however, the turnover factor may be partially mitigated.

20. Note that the assumption of caseload remaining similar is of particular importance as the number of cases assigned to the SPD have not yet returned to pre-pandemic levels. This may be due to a variety of reasons including but not limited to bottlenecks in other areas of the criminal justice system, a positive economic situation resulting in fewer defendants meeting the indigency standard and fewer attorneys willing to take cases at \$70 per hour.

21. In order to calculate the estimated funding needed to support the increase to \$100, the 2022-23 actual expenditures through April 30, 2023, plus two more months of the prior 10 month average could be used. Using these numbers, expenditures can be adjusted to reflect the \$100 rate. This calculation indicates that SPDs base for private bar reimbursements could be provided with \$8,797,200 GPR annually to support the increase to \$100 per hour for the private bar. [Alternative 1] Under this alternative, the private bar rate would increase to \$100 per hour on July 1, 2023.

22. Alternatively, the Committee may wish to adjust funding to reflect current private bar caseloads, but not increase the private bar rate or provide funding for that increase. This alternative would support estimated costs if the current \$70 per hour rate is maintained. Using current estimated 2022-23 expenditures indicates that SPDs base for private bar reimbursements can be reduced by \$5,910,300 GPR annually. [Alternative 2] This alternative may continue to require the SPD and counties spend time and resources to find representation for indigent defendants and could cause

delays in the criminal justice system.

23. If the Committee takes no action, funding for the private bar would remain at 2023-25 base funding level. [Alternative 3]

ALTERNATIVES

1. Provide \$8,797,200 GPR annually and modify current law to increase the rate at which private bar attorneys are compensated from \$70 per hour to \$100 per hour and from \$25 to \$50 per hour for travel. In addition, grant the SPD authority to modify rules to reflect the changes in the rate. The increase in hourly compensation would apply to cases assigned on or after July 1, 2023.

ALT 1	Change to Base
GPR	\$17,594,400

2. Reduce funding by \$5,910,300 GPR annually to reflect the continuation of the \$70 per hour rate.

ALT 2	Change to Base
GPR	-\$11,820,600

3. Take no action.

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